NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DIVISION

In re: MORDECHAI YOSEF ORIAN and YUN RU, Debtors.	Case No. 9:16-bk-10514-PC Chapter 7 Adversary No. 9:16-ap-01109-PC
MORDEHAI ASAF and LIORA ASAF, Plaintiffs, v. MORDECHAI YOSEF ORIAN and YUN RU, Defendants.	**MEMORANDUM DECISION** Date: June 14, 2018 Time: 9:00 a.m. Place: United States Bankruptcy Court Courtroom # 201 1415 State Street Santa Barbara, CA 93101

Mordehai Asaf and Liora Asaf (the"Asafs") object to the granting of a discharge to Mordechai Yosef Orian ("Orian") and Yun Ru ("Ru") pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(3), (a)(4) and (a)(5), and seek a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6).[1] Trial of this adversary proceeding was commenced and

[1] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule"

concluded on June 14, 2018. Having considered the evidentiary record and argument of the parties, the court will enter a judgment in favor of Orian and Ru based upon the following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a), as incorporated into FRBP 7052.[2]

I. STATEMENT OF FACTS

On March 22, 2016, Orion and Ru filed their voluntary petition under chapter 11 of the Bankruptcy Code. On September 15, 2016, the case was converted to a case under chapter 7 after a hearing at which the debtors were unable to establish that they could effectively reorganize within a reasonable period of time. Sandra McBeth ("McBeth") was appointed as trustee. McBeth commenced the meeting of creditors on October 24, 2016. Debtors' original schedules filed on April 5, 2016, were amended six times between April 5, 2016 and February 3, 2017, to disclose interests in assets and to correct inconsistencies. Debtors also amended their statement of financial affairs on February 3, 2017. McBeth concluded the meeting of creditors on March 9, 2017, and filed a Trustee's Report of No Assets on March 15, 2017. Orion and Ru completed the financial management course required for a discharge and filed their respective certificates on April 3, 2017. They await a discharge.

On December 23, 2016, the Asafs timely filed an 84-page complaint seeking to have a debt allegedly owed to them by Orion and Ru declared nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6), and to deny their discharge under 11 U.S.C. § 727(a)(2)(A),

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references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

[2] The court notes that the Asafs filed a 137-page document on June 22, 2018, entitled "Follow Up Declaration" [Dkt. # 44]. The evidentiary record closed prior to final argument and the matter was taken under submission on June 14, 2018. The court did not request nor authorize either party to file a post-submission brief or other document. Accordingly, the court has not considered Asafs' Follow Up Declaration in making its findings of fact and conclusions of law in support of this Memorandum.

(a)(3), (a)(4) and (a)(5).[3] Orion and Ru filed their answer to the complaint on January 23, 2017. After a trial on June 14, 2018,[4] the matter was taken under submission.

II. DISCUSSION

This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I), (J) and (O). The parties expressly consent to entry of final orders and a final judgment by this court. Venue is appropriate in this court. 28 U.S.C. § 1409(a). Objections to the dischargeability of a debt are literally and strictly construed against the objector and liberally construed in favor of the debtor. See Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997). Likewise, objections to discharge are to be literally and strictly construed against the objector and liberally construed in favor of the debtor. Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1297 (9th Cir. 1986). "Courts should deny discharge only for very specific and serious infractions." Martin Marietta Materials Sw., Inc. v. Lee (In re Lee), 309 B.R. 468, 476 (Bankr. W.D. Tex. 2004).

A. First and Second Claims for Relief Under 11 U.S.C. § 523(a)(2)(A).

Section 523(a)(2)(A) excepts from discharge in bankruptcy "any debt for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A).[5] To establish that a debt is nondischargeable under § 523(a)(2)(A), the plaintiff must show by a preponderance

[3] Complaint: 1) to Determine Nondischargeability of Debt Pursuant to 11 U.S.C. § 523(a)2)(A), (a)(4) and (a)(6); and 2) for Denial of Discharge Pursuant to 11 U.S.C. § 727(a)(2); (a)(3); (a)(4) and (a)(5) ("Complaint") [Dkt. # 1] filed December 22, 2016.

[4] At trial the Asafs and Orian and Ru appeared pro se. The court heard the testimony of Mordehai Asaf, Liora Asaf, Mordechai Yosef Orian, Yun Ru, Lisa Marie Williams and Adam Aber. Much of the testimony given by both parties was (1) vague lacking specificity as to date, time and place; (2) argumentative; (3) assumed facts not in evidence; and (4) constituted hearsay. The Asafs did not introduce any documents into evidence, and little of the testimony introduced in support of their case in chief proved relevant to the eight claims made the basis of their complaint.

[5] "A false representation is an express representation, while a false pretense refers to an implied representation or 'conduct intended to create and foster a false impression.'" Nat'l Bank of N. Am. V. Newark (In re Newark), 20 B.R. 842, 854 (Bankr. E.D.N.Y. 1982) (quoting H.C. Prange Co. v. Schnore (In re Schnore), 13 B.R. 249, 251 (Bankr. W.D. Wis. 1981).

of the evidence that (a) debtor made a representation; (b) at the time, debtor knew the representation was false; (c) debtor made the representation with the intention and purpose of deceiving the creditor; (d) the creditor justifiably relied on the debtor's representation, and (e) the creditor sustained the alleged loss and damage as the proximate result of such representation. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010); Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 827 (9th Cir. 2002).

The creditor must establish by a preponderance of the evidence all five elements to prevail. See Glucoma Am., Inc. v. Ardisson (In re Ardisson), 272 B.R. 346, 357 (Bankr. N.D. Ill. 2001). "The burden of showing something by a 'preponderance of the evidence,'. . . 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (citation omitted).

Not only must a representation be false, but the creditor must prove that the debtor knew the representation was false and made it with the subjective intent to deceive her at the time the representation was made. See Gasunas v. Yotis (In re Yotis), 548 B.R. 485, 495 (Bankr. N.D. Ill. 2016). Because direct evidence of intent to deceive is rarely available, "the intent to deceive can be inferred from the totality of circumstances, including reckless disregard for the truth." Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 167-68 (9th Cir. BAP 1999); see Nahman v. Jacks (In re Jacks), 266 B.R. 728, 742 (9th Cir. BAP 2001) ("Because fraud lurks in the shadows, it must usually be brought to light by consideration of circumstantial evidence." (internal quotation marks and citation omitted)).

Finally, to be actionable, a misrepresentation must induce justifiable reliance and resulting damage. "Justifiable reliance is an essential element of a claim for fraudulent misrepresentation[.]" Guido v. Koopman, 1 Cal.App.4th 837, 843 (1991). "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or

other transaction." S. Union Co. v. Sw. Gas Corp., 180 F. Supp.2d 1021, 1033 (D. Ariz. 2002). "In other words, a party must be 'thoroughly induced' by a fraudulent misrepresentation that, 'judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.'" Id. (citation omitted). "Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case." Field v. Mans, 516 U.S. 59, 71 (1995). "[A] person is justified in relying on a factual representation without conducting an investigation, so long as the falsity of the representation would not be patent upon cursory examination." Id. at 60. "In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered." Guido, 1 Cal.App.4th at 843.

In their First Claim for Relief, the Asafs alleged that: (1) Mordehai Asaf and Yun Ru were partners in Talia Ranch, Inc., a partnership formed to develop a five-acre farm in Hawaii located at 87-372 Kaohe Mauka Place, Captain Cook, HI ("Captain Cook Property"); (2) the Asafs deposited $500,000 into a bank account in the name of Talia Ranch pursuant to a "Memorandum of Understanding" between the parties; (3) Orian "represented through the Memorandum of Understanding that they would not withdraw any sum in excess of $10,000 without the signatures of both Plaintiff Mordehai Asaf and Defendant Orian . . . ;" and (4) Orian and/or Ru subsequently withdrew the sum of $100,000 from the account without Mordehai Asaf's authorization.[6]

At trial the Asafs did not establish a representation by either Orian or Ru that was knowingly false and made with the present intention to deceive either of the Asafs. The Asafs did not introduce into evidence the Talia Ranch partnership agreement, Memorandum of Understanding, or evidence of an account, signature card, or bank statements for the Talia Ranch partnership account, including any statement reflecting a withdrawal of the $100,000 at issue or document identifying the date, time and manner of the withdrawal and the person who did it. After the Asafs rested, the court admitted Defendant's Exhibit UU – a copy of a Partnership

[6] See Complaint, at 15-1-16:2.

Agreement between Mordehai Asaf and Ru dated April 19, 2015, for a partnership named "Talia Ranch, Inc." formed for the purpose of developing an "Organic Farm" and "creating Agro-tourism." It reflects a capital contribution by Mordehai Asaf and Ru of $500,000 each, and states that funds of the partnership would be deposited at "Bank of America, N.A." "Talia Ranch INC account . . . ."[7] The court also admitted Defendants' Exhibit TT – a Memorandum of Understanding ("MOU") between Mordechai Orian and Mordehai Asaf dated March 27, 2015, the intent of which was to, among other things, confirm a partnership in the development of Talia Ranch and "[i]dentify a $500,000 loan provided by Mordehai Asaf for the Talia Ranch development venture . . . ."[8] Paragraph VI(2) of the MOU states that "[t]he funded $500,000 will be deposited in an account that will require the signatures of both parties, "Party A and Party B". Paragraph VI(3) of the MOU further states that "[n]either Party A nor Party B will spend over $10,000 at any given time without the other party's approval via email or in writing."[9] Finally, the court admitted Defendants' Exhibit WW – a copy of a statement from Bank of America regarding Talia Ranch, Inc. Account # . . . 8263 dated October 31, 2015, purporting to show a withdrawal of $400,091 by the Asafs on October 22, 2015. Ru testified that she was not involved in the operation, management, or finances of Talia Ranch, that Orian managed the bank account for Talia Ranch, and that Orian had Ru's authorization to do so. Both Ru and Orian denied withdrawing $100,000 from the Talia Ranch partnership account in violation of the MOU and there was no evidence to the contrary.[10] Based on the evidence presented, the court is unable

[7] Defendants' Exhibit UU, at 6.

[8] Defendants' Exhibit TT, at 1.

[9] Id. at 3.

[10] Attached to the Complaint as Exhibit H is a copy of a document purporting to be a statement for Bank of America Account # . . . 8263, Talia Ranch, Inc. for the period of September 1, 2015 to September 30, 2015, showing a withdrawal of $30,000 on September 14, 2015, and a withdrawal of $10,000 on September 18, 2015. Even if it had been offered and admitted into evidence, only one of the withdrawals exceeded the $10,000 limit under the MOU and there was no evidence establishing the identity of the person who made the withdrawal or the fact that it was unauthorized. Likewise, Defendants' Exhibit WW – the statement for Bank of America Account # . . . 8263, Talia Ranch, Inc. for the period of October 1, 2015 to October 31, 2015,

to find that the Asafs have satisfied their burden under 11 U.S.C. § 523(a)(2)(A) regarding an alleged false representation by either Orian or Ru under the MOU.

With respect to their Second Claim for Relief, the Asafs failed to establish by testimony or other evidence that Orian:

1. Falsely represented "[t]hat he was a practicing attorney with an expertise in the field of immigration law;"
2. Falsely represented "[t]hat Javier Lopez Perez was an attorney, actively practicing at the Lopez Perez Law Firm;"
3. Falsely represented "[t]hat Javier Lopez Perez was licensed to practice law in the State of California;"
4. Falsely represented "[t]hat he would perform adequate due diligence in connection with [the Asafs'] acquisition of the spa business to ensure among other things that they were not overpaying for the business;"
5. "Misrepresented the value of the spa business purchased by [the Asafs] in connection with their E-2 Visa Application;"
6. Falsely represented "[t]hat he would arrange for someone at the Lopez-Perez Law Firm to file a lawsuit on behalf of [the Asafs] against the sellers due to misrepresentations made in connection with the purchase of the spa;"
7. "Failed to inform [the Asafs] that he would receive a commission from the sale of the spa;"
8. Falsely represented "[t]hat in addition to applying for an E-2 Visa, it would be necessary for [the Asafs] to apply for an EB-5 Visa;"
9. Falsely represented "[t]hat the Lopez-Perez Law Firm specialized in EB-5 Visas and worked on approximately 700 cases per year;"
10. Falsely represented "[t]hat he would obtain an EB-5 Visa on their behalf;"

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shows nine withdrawals from the account before the Asafs withdrew the balance of $400,091 on October 22, 2015. Only one of the nine withdrawals exceeded the $10,000 limit under the MOU and there was no evidence establishing the identity of the person who made the withdrawal or the fact that it was unauthorized.

11. Falsely represented "[t]hat in order to obtain an EB-5 Visa, [the Asafs] would need to purchase an interest in the Captain Cook Property from him and Yun and make an additional $500,000 investment in Talia Farms;"
12. Falsely represented "[t]hat the $300,000 paid for the Captain Cook Property could not be counted toward the $500,000 investment required for the EB-5 Visa Application;"
13. Falsely represented "[t]hat the value of the Captain Cook Property was $1,200,000 and that there were substantial existing liens secured by the Captain Cook Property;"
14. "Failed to disclose that [Orian and Ru] misrepresented the sale price of the transfer to [the Asafs] to the State of Hawaii in the Conveyance Tax Certificate and forged [Mordehai Asaf's] name on the Conveyance Tax Certificate;" and
15. Falsely represented "[t]hat [the Asafs] would have equal access to the Captain Cook Property and to the assets and proceeds from the Captain Cook Property."[11]

According to evidence largely presented by Orian and Ru, Orian for a time maintained a business office on the premises of the Lopez-Perez Law Center. He assisted Javier Lopez Perez, Esq., an attorney licensed in Puerto Rico, in communicating with Jewish clients, as well as Hebrew translations, marketing in Israeli magazines, and other client relations. The firm employed attorneys licensed in California to perform immigration legal services, including Zarina Ashurova. Orian was not an employee of the Lopez-Perez Law Center nor did he receive compensation from the firm. Orian denied ever holding himself out as an attorney, giving legal advice, or accepting anything in exchange for legal services. The Asafs, who were familiar with E-2 and EB-5 Visas, contacted the Lopez-Perez Law Center and requested that the firm secure an E-2 Visa for Liora Asaf based on her citizenship in Argentina. The Asafs, who also wanted to buy an operating spa in the United States, also retained the firm to form a corporation called "Waterlee, Inc." to acquire the spa business. The Asafs executed two retainer agreements with the Lopez-Perez Law Center (1) Defendants' Exhibit D – a retainer agreement between the Asafs and Lopez-Perez Law Center, Inc. dated December 4, 2014, reflecting a $7,000 fee for "[l]egal services related to the process and filing of the E-2 Visa Application"; and (2)

[11] Complaint, 16:6-17:11.

Defendants' Exhibit E -- a retainer agreement between the Asafs and Lopez-Perez Law Center, Inc. dated December 4, 2014, reflecting a $1,200 fee for "[l]egal services related to the process of opening a corporation."

Malibu Ventures, Inc., an entity owned by Orian, assisted the Asafs in acquiring LA Bliss Spa, an existing business in the United States, to help Liona Asaf satisfy the requirements for an E-2 Visa. Lisa Marie Williams, an employee of Malibu Ventures, Inc., testified regarding the amount of work performed by Malibu Ventures, Inc. to locate the business opportunity, secure the financial information necessary for the Asafs to make an informed decision whether to invest, and to close the deal. Williams testified that the Asafs then used Malibu Ventures, Inc. to interview employees, assist in the spa's operation, build a website, create a new cosmetic line for the spa, and work with the Asafs to make the business a success. There is no evidence that either Orian or Malibu Ventures, Inc. failed to investigate LA Bliss Spa before suggesting it to the Asafs, misrepresented the value of the spa, or received a commission on the sale of the business to the Asafs. Nor was there evidence of any misrepresentations by the sellers of LA Bliss Spa or that Orian stated that he would arrange for someone at the Lopez-Perez Law Firm to sue them. In fact, there was no evidence that Malibu Ventures, Inc. or Orian were compensated at all by the Asafs for the work they performed on their behalf in conjunction with the spa.

Mordehai Asaf wanted to take advantage of the EB-5 program that permitted a foreigner to invest $500,000 in a regional center that would create jobs and qualify him for a green card. Orian and Ru owned the Captain Cook Property in Hawaii. Mordehai Asaf paid Orian and Ru the sum of $300,000 to acquire an undivided 50% interest in the Captain Cook Property and contributed an additional $500,000 in capital to Talia Ranch, Inc. for development of the land and construction of a "Holistic Paradise Retreat Center" on the property. There was no evidence to suggest that Mordehai Asaf's investment in the Captain Cook Property or Talia Ranch, Inc. was less than a fully-informed decision on his part. There was no evidence that either Orian or Ru made any false representation in conjunction with the value of the Captain Cook Property, the liens against the property, or the amount to be paid for an interest in the property. In direct examination by Asaf, Orian testified that a sales price of $162,720 rather than $300,000 was

inserted in the Conveyance Tax Certificate given to the State of Hawaii at the understanding of both parties in an effort to pay less taxes on the transaction. Finally, Mordehai Asaf had equal access to the Captain Cook Property by virtue of his undivided 50% ownership interest in the property, and there was no credible evidence that Orian or Ru, either individually or collectively, denied him access to the property. To the extent the assets on the property belonged to Talia Ranch, Inc., Mordehai Asaf had access as a partner to the assets and proceeds of Talia Ranch, Inc. There was no evidence that either Orian or Ru falsely represented to him that he did not have such access.

B. Third Claim for Relief Under 11 U.S.C. § 523(a)(6).

Section § 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Section 523(a)(6) requires a debt attributable to an intentional tort. See Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998).[12] "Willful" and "malicious" are separate elements. See In re Barboza, 545 F.3d 702, 711 (9th Cir. 2008). "[T]he willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or the debtor believed that injury was substantially certain to occur as a result of his conduct." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001); see Carrillo v. Su (In re Su), 290 F.3d 1140, 1145 n.3 (9th Cir. 2002) ("§ 523(a)(6) nondischargeability [is limited] to those situations in which the debtor possesses subjective intent to cause harm or knowledge that harm is substantially certain to result from his actions."). "A 'malicious' injury involves '(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.'" Jercich, 238 F.3d at 1209. "This four-part definition does not require a showing of biblical malice, i.e., personal hatred, spite, or ill-will." Murray v. Bammer (In re Bammer), 131 F.3d 788, 791 (9th Cir. 1997).

[12] The type of debts excluded from discharge under § 523(a)(6) "triggers in the lawyer's mind the category of intentional torts, as distinguished from negligent or reckless torts." Kawaauhau, 523 U.S. at 61-62. "Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself." Id.

The Asafs claim that "[d]ebtors committed a willful and malicious injury to the property of Plaintiffs by removing $100,000 from the Talia Ranch bank account without providing any notice to Plaintiffs or seeking Plaintiffs' approval and without Plaintiffs' authorization and by repeatedly forging Mordehai Asaf's signature in order to withdraw the funds."[13] At trial the Asafs did not introduce any evidence to support a finding that either Orian or Ru improperly withdrew funds from the Talia Ranch partnership account established at Bank of America, or that either Orian or Ru forged Mordehai Asaf's signature to a document to obtain funds from the account. As previously stated, Ru testified that she was not involved in the operation, management, or finances of Talia Ranch, that Orian managed the bank account for Talia Ranch, and that Orian had Ru's authorization to do so. Both Ru and Orian denied withdrawing $100,000 from the Talia Ranch partnership account in violation of the MOU and there was no evidence to the contrary. Having failed to satisfy their burden to establish an intentional tort by either Orian or Ru, the court will deny the relief requested by the Asafs under 11 U.S.C. § 523(a)(6).

C. Fourth Claim for Relief Under 11 U.S.C. § 523(a)(4).

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . . ." 11 U.S.C. § 523(a)(4). A debt is excepted from discharge under § 523(a)(4) where "1) an express trust existed, 2) the debt was caused by fraud or defalcation, and 3) the debtor acted as a fiduciary to the creditor at the time the debt was created." Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997) (quoting Klingman v. Levinson, 831 F.2d 1202, 1295 (7th Cir. 1987). Federal law governs the issue of whether the debtor is a fiduciary for purposes of a claim under § 523(a)(4). Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003). "[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). "California partners are fiduciaries within the meaning of § 523(a)(4)." Ragsdale v. Haller, 780 F.2d 794, 796-97 (9th Cir. 1986). Defalcation requires a culpable state of mind . . .

[13] Complaint, 19:18-21.

one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." Bullard v. BankChampaign, N.A., 133 S.Ct. 1754, 1757 (2013).

Mordehai Asaf and Ru, as partners in Talia Ranch, Inc., had a fiduciary relationship within the meaning of § 523(a)(4). However, there was no evidence that Ru absconded with partnership assets, committed a defalcation while acting in fiduciary capacity as a partner in Talia Ranch, Inc., or embezzled or stole $100,000 from the bank account for Talia Ranch Inc. Orian was not a partner in Talia Ranch, Inc. Even assuming Orian may have been a fiduciary to Mordehai Asaf by virtue of the MOU, there was no credible evidence that Orian removed the sum of $100,000 from the Talia Ranch, Inc. account as alleged by the Asafs. Nor was there evidence that Orian absconded with partnership assets. Adam Aber, a witness related by marriage to Mordehai Asaf, was employed by Talia Ranch, Inc. on May 24, 2015, at a salary of $2,250 per month to manage and develop the farm. Aber testified that, after the Asafs made the $400,091 withdrawal from the Talia Ranch partnership bank account on October 22, 2015, he and another employee, Josh Sloan, continued to work on the farm without compensation. He testified that they sold some cucumbers in September 2015 for funds to pay expenses. He further testified that he asked and received permission from Orian to sell some farm equipment for $4,000 because he had not been paid and needed funds on which to live. Aber testified that a Yukon SUV owned by Talia Ranch, Inc. was not sold, but was left with Nathalie Dayan before he left the island. There was no evidence that either Orian or Ru improperly removed or sold assets of the partnership for their personal benefit.

Finally, there was no proof of a retainer for legal fees paid to Orian as alleged in the Complaint. Orian is not an attorney. The only evidence of a retainer for legal fees paid by the Asafs was (1) Defendants' Exhibit D – a retainer agreement between the Asafs and Lopez-Perez Law Center, Inc. dated December 4, 2014, reflecting a $7,000 fee for "[l]egal services related to the process and filing of the E-2 Visa Application"; and (2) Defendants' Exhibit E -- a retainer agreement between the Asafs and Lopez-Perez Law Center, Inc. dated December 4, 2014, reflecting a $1,200 fee for "[l]egal services related to the process of opening a corporation." Orian admitted that for a time he maintained a business office on the premises of the Lopez-

Perez Law Center, but he denied ever holding himself out as an attorney, giving legal advice, or accepting anything in exchange for legal services, including any retainer for legal services to the Asafs.

D. Fifth Claim for Relief Under 11 U.S.C. § 727(a)(4)(A).

Section 727(a)(4)(A) authorizes the court to deny a chapter 7 discharge to a debtor who "knowingly and fraudulently" makes a false oath in or in connection with the case. "The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate information without having to conduct costly investigations." Fogal Legware of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 63 (9th Cir. BAP 1999). To prevail under § 727(a)(4)(A), the plaintiff must show: (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly, and (4) the oath was made fraudulently. Id., at 62; Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP 2005). A debtor "acts knowingly if he or she acts deliberately or consciously." Roberts, 331 B.R. at 883. A debtor's fraudulent intent may be established by circumstantial evidence or by inferences drawn from the debtor's course of conduct. In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985); Stanley v. Hoblitzell (In re Hoblitzell), 223 B.R. 211, 215 (Bankr. E.D. Cal. 1998).

Debtors have an absolute duty to file complete and accurate schedules. See Cusano v. Klein, 264 F.3d 936, 946 (9th Cir. 2001). A false oath may involve a false statement or omission in the debtor's schedules. Wills, 243 B.R. at 62. To be actionable under § 727(a)(4), the false statement or omission in schedules or statements must be material. Id. at 62 ("A false statement is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property.").

> A false statement or omission that has no impact on a bankruptcy case is not grounds for denial of a discharge under § 727(a)(4)(A). As a result, omissions or misstatements relating to assets having little or no value may be considered immaterial. Likewise, omissions or misstatements concerning property that would not be property of the estate may not meet the materiality requirement of §

> 727(a)(4)(A). However, an omission or misstatement relating to an asset that is of little value or that would not be property of the estate is material if the omission or misstatement detrimentally affects the administration of the estate.

Id. at 63 (citations omitted). Errors and omissions in a debtor's schedules and statements may be corrected by amendment. Debtors have the right to amend their petition, lists, schedules and statements as a matter of course at any time until the case is closed. FRBP 1009(a).

The Asafs assert that Orian and Ru should be denied under § 727(a)(4) because they "failed to schedule the following assets in their initial Schedules:

a. Funds received from the sale of the one-half interest in the Captain Cook Property to Plaintiffs for $300,000;
b. Cash in the amount of $100,000 taken from Plaintiffs;
c. An airplane kept in Hawaii;
d. Income from the sale of vegetables from Talia Ranch;
e. Rental income from the Captain Cook Talia Ranch;
f. Rental income from other improved real property owned by Defendants in Hawaii;
g. Interests in Venues Royale, Inc. and Malibu Ventures, Inc.;
h. An alleged but disputed claim against Plaintiffs; and
i. Personal property located on the Captain Cook Property including but not limited to:
    1. Vehicles, including but not limited to a new All-Terrain Vehicle, a beige Yukon SUV and a white Cadillac
    2. Equipment, including but not limited to a new lawn mower, a benzene scythe, electrical equipment, mechanical equipment, vacuum cleaners and a toolbox; and
    3. Personal property kept on the property and in the units they rent including but not limited to refrigerators."[14]

With respect to the disclosure of assets, Orian and Ru disclosed in their original Schedule A ownership of an undivided 50% interest in the Captain Cook Property and further, that the other undivided one-half interest was owned by Liona Asaf. The property was valued at

[14] Complaint, 22:23-23:15.

$600,000 with their undivided one-half interest valued at $300,000. The sale of an undivided 50% interest in the Captain Cook Property was disclosed by Orian and Ru in an amended Statement of Financial Affairs filed on February 13, 2017.[15] Orian and Ru disclosed their interest in Venues Royale, Inc. and Malibu Ventures, Inc. in amended schedules filed on December 8, 2016, and a contingent, unliquidated claim against the Asafs valued at "0.00" in amended schedules filed on February 13, 2017. The Asafs did not establish at trial by a preponderance of the evidence that either Orian or Ru (1) withdrew $100,000 from the Talia Ranch, Inc. partnership account for their own use and benefit; (2) owned an interest in an airplane on the petition date; (3) derived undisclosed income, as a partner or otherwise, from the sale of vegetables from Talia Ranch; (4) derived undisclosed rental income from the Captain Cook Property; or (5) derived undisclosed rental income from other unidentified properties ostensibly owned by Orian or Ru in Hawaii. Much of the personal property located on the Captain Cook Property was owned by Talia Farms, Inc. and used by the partnership to develop and maintain the property; and Orian and Ru disclosed in the schedules their interest in the Captain Cook Property and Talia Ranch, Inc. Orian testified that he received no compensation from the Lopez-Perez Law Firm. There was no evidence to the contrary. Nor was there credible evidence that either Orian or Ru converted or absconded with assets of Talia Ranch, Inc. or received income from sales commissions or business interests that required disclosure in either the schedules or statements. Finally, Orian disclosed in amended schedules filed on December 8,

[15] Orian and Ru disclosed a sale amount of $162,750 which is consistent with the amount disclosed by both Mordehai Asaf and Ru to the State of Hawaii in the Conveyance Tax Certificate. There was testimony at trial that Asaf and Ru misrepresented the sale price of Asaf's one-half interest in the Captain Cook Property in the Conveyance Tax Certificate in conjunction with Asaf's purchase of the property. To the extent the representation to the State of Hawaii may have been false, it was not made "in or in connection with the case" as required by § 727(a)(4)(A). In their schedules, Orian and Ru disclosed under penalty of perjury material facts regarding the Captain Cook Property, i.e. (1) the existence and location of the Captain Cook Property; (2) the value of the property at $600,000; (3) ownership of an undivided one-half interest in the property valued at $300,000, and (4) ownership by Liona Asaf of the other undivided one-half interest in the property at the time of bankruptcy. McBeth had these facts before filing her no-asset report. Under the circumstances, the court cannot find that any omission or misstatement by Orian or Ru regarding the Captain Cook Property detrimentally affected McBeth's administration of the estate.

2016, his use of the names "Motty Bar" and "Mordi Orian" during the eight years preceding the petition date. All of Orian and Ru's amended schedules and statements were filed prior to a conclusion of the meeting of creditors, so McBeth had an opportunity to examine Orian and Ru regarding their financial condition on the petition date and the accuracy, completeness and veracity of the amended documents before filing a Trustee's Report of No Assets on March 15, 2017.

E. Sixth Claim for Relief Under 11 U.S.C. § 727(a)(2)(A).

Section 727(a)(2)(A) states that the court shall grant the debtor a discharge unless "the debtor, with the intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property . . . , has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed, property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A). For a discharge to be denied under § 727(a)(2)(A), there must be (1) a disposition of property (i.e., transfer or concealment); (2) with subjective intent to hinder, delay or defraud a creditor; and (3) it must occur within one year prior to filing bankruptcy. Wills, 243 B.R. at 65. Because the statute is written in the disjunctive, an intent to hinder or delay is sufficient to deny discharge under § 727(a)(2). Bernard v. Sheaffer (In re Bernard), 96 F.3d 1279, 1281 (9th Cir. 1996). Proof of fraud is not necessary nor is injury to creditors relevant for purposes of § 727(a)(2). Id. at 1281-82.

As previously stated, the Asafs did not establish at trial by a preponderance of the evidence that either Orian or Ru (1) withdrew $100,000 from the Talia Ranch, Inc. partnership account for their own use and benefit; or (2) converted or absconded with assets of Talia Ranch, Inc. Orian and Ru disclosed in their original Schedule A that (1) they owned an undivided one-half interest in the Captain Cook Property valued at $600,000; (2) the value of their interest in the property was $300,000; and (3) the other undivided one-half interest was owned by Liona Asaf. With respect to the sale of the one-half interest in the property to Asaf, the Asafs admit in their Complaint that Orian and Ru disclosed to the court the sale to Mordehai Asaf for $300,000 before the case was converted to a case under chapter 7.

F. Seventh Claim for Relief Under 11 U.S.C. § 727(a)(3).

Section 727(a)(3) authorizes the court to deny a chapter 7 discharge to a debtor who "has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure was justified under all of the circumstances of the case." 11 :U.S.C. § 727(a)(3). "[T]he purpose of § 727(a)(3) is to make discharge dependent on the debtor's true presentation of his financial affairs." Caneva v. Sun Communities Operating Ltd. P'ship (In re Caneva), 550 F.3d 755, 761 (9th Cir. 2008). The debtor must "present sufficient written evidence which will enable his creditors reasonably to ascertain his present condition and to follow his business transactions for a reasonable period in the past." Id. (citation omitted). Under § 727(a)(3), the plaintiff must first establish that "'(1) the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions.'" Id. (citation omitted). After showing inadequate or nonexistent records, 'the burden then shifts to the debtor to justify the inadequacy or nonexistence of the records.'" Id. (citation omitted). "The bankruptcy court has wide discretion in both inquiries." Lee, 309 B.R. at 478.

The Asafs did not introduce any evidence to establish that Orian and Ru failed to maintain and preserve records sufficient to ascertain their financial condition and material business transactions. No evidence was introduced to support the claim that (1) "Debtors have failed to prepare or file personal 2015 tax returns or corporate tax returns for Talia Ranch or Malibu Ventures" or (2) that "Debtors are unable to properly account for the revenues from the Captain Cook Property."[16] Because the Asafs did not establish an inadequacy or nonexistence of financial records, the court is unable to find that the discharge of Orian or Ru should be denied under 11 U.S.C. § 727(a)(3).

[16] Complaint, 25:18-19; 25:28-26:3.

G. Eighth Claim for Relief Under 11 U.S.C. § 727(a)(5).

Section 727(a)(5) authorizes the court to deny a chapter 7 discharge to a debtor who "has failed to explain satisfactorily, before determination of denial of discharge, any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). Under § 727(a)(5) the initial burden of going forward is on the objecting party who must introduce some evidence of (a) a disappearance of substantial assets or of an unusual transaction; (b) a request that the debtor explain such disappearance or unusual transaction; and (c) a failure of the debtor to respond satisfactorily to the inquiry. Cheyenne Mountain Bank v. Duncan (In re Duncan), 123 B.R. 383, 388 (Bankr. C.D. Cal. 1991). In other words, "[t]he creditor must prove which assets are missing to make a prima facie case." Lee, 309 B.R. at 478. The burden then shifts to the debtor to satisfactorily explain what happened. Duncan, 123 B.R. at 388.

The Asafs assert that discharge should be denied under 11 U.S.C. § 727(a)(5) becauses (1) "Debtors have failed to schedule or explain what happened to the $100,000 they withdrew from the Talia Ranch bank account;" (2) "Debtors have failed to schedule or explain what happened to the $300,000 they were paid by Plaintiffs for the purchase of a 50% interest in the Captain Cook Property;" and (3) "Debtors have failed to schedule or explain what happened to the income generated from the Captain Cook Property."[17] The evidence adduced at trial fell short of establishing a prima facie case for a denial of discharge under § 727(a)(5). As previously stated, Debtor's schedules and statements, as amended, are consistent with the testimony and evidence admitted at trial regarding the Debtor's financial condition on the date of bankruptcy.

The court as the trier of fact must judge the credibility of witnesses and weigh the evidence accordingly. See, e.g., Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it."); Moore v. Chesapeake & O. Ry. Co., 340 U.S. 573, 576 ("[I]t is the jury's function to credit or discredit all or part of the testimony."). Having parsed through the conflicting

[17] Complaint, 26:13-18.

testimony and documentary evidence and in light of the policy requiring that objections to discharge and the dischargeability of a debt be construed literally and strictly against the objector and liberally in favor of the debtor, the court finds the record insufficient to support a finding that either Orian or Ru engaged in conduct warranting a denial of discharge or a determination that a debt claimed to be owing to the Asafs be determined to be nondischargeable.

III. CONCLUSION

For the reasons stated, the Asafs have failed to establish that a discharge should be denied either Orian or Ru under 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4) or (a)(5), or that the debt claimed to be owing by Orian and/or Ru to the Asafs should be determined nondischargeable under either 11 U.S.C. § 523(a)(2)(A), (a)(4) or (a)(6). A separate judgment will be entered consistent with this memorandum decision.

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Date: July 2, 2018

Peter H. Carroll
United States Bankruptcy Judge